

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

Case No. 2005-4553-AR

FRANK ERIC RICHTER,

Defendant-Appellant.

OPINION AND ORDER

Defendant-Appellant (hereinafter "Defendant") has filed an appeal from his conviction of stalking. The People contend the trial court did not abuse its discretion, and request the Court affirm Defendant's conviction.

Defendant was convicted of stalking by a jury on August 16, 2005. Defendant contends that the trial court erred on several evidentiary rulings that prevented him from presenting a defense.

On appeal, this Court reviews challenges to evidentiary rulings under an abuse of discretion standard. *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997). Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when there is a tendency that the evidence



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will be given undue or preemptive weight by the jury, or when it would be inequitable to allow the use of the evidence. *In re Flury Estate*, 218 Mich App 211, 217; 554 NW2d 39 (1996).

In addition, MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 769.26 means that appellate courts should not reverse a conviction unless the error was prejudicial. *People v Mateo*, 453 Mich 203, 210; 551 NW2d 891 (1996). Whether a preserved nonconstitutional error is harmless depends on the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427, 635 NW2d 687 (2001). The error is presumed to be harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494; 596 N.W.2d 607 (1999).

Defendant first contends that the trial court's failure to enforce defense subpoena's was clear error mandating reversal. Prior to trial, counsel for Defendant issued a subpoena to the complaining witness, requesting her telephone records. Counsel for Defendant contends that the records were needed to establish that the complaining witness was contacting Defendant, thereby refuting the element that Defendant's contact was nonconsensual. At trial, the complaining witness failed to bring the subpoenaed telephone records. The People located one telephone record in its case file, and represented to the Court that the complaining witness did not have the remainder of the records requested. The trial court did not enforce the subpoena based upon the representations that the complaining witness did not retain the records. The trial court also

indicated that Defendant should have subpoenaed the complaining witness's telephone company for the records.

The Court is satisfied that the trial court's decision regarding the subpoenaed telephone records was not an abuse of discretion. The trial court accepted the statements regarding the lack of possession of the records. It is axiomatic that a party cannot produce documents that are no longer in possession, and therefore the trial court's decision was appropriate. In addition, Defendant could have obtained the records through his own telephone company, or through the complaining witness's telephone company. Furthermore, the Court is also satisfied that any potential error was not prejudicial.

Defendant next argues that the trial court's ruling that a personal protection order filed by the complaining witness was irrelevant was improper. The Court disagrees. The Court finds the trial court properly held the personal protection order to be irrelevant. In addition, it appears to this Court that an *ex parte* application for personal protection order denied by this Court would have been more prejudicial than probative and therefore excluded pursuant to MRE 403. The Court is further satisfied that any potential error was not prejudicial.

Defendant's final argument is that the Court committed reversible error by failing to allow the testimony of an independent witness regarding statements the complaining witness allegedly made when being served with Defendant's subpoena. Defendant contends that the witness was to testify that the complainant stated she was going to "pay him [Defendant] back", that the Defendant was a "no good mother fucker", and that she was "gonna get him".

The Court is satisfied that the trial court did not abuse its discretion in ruling the potential testimony irrelevant. The Court is not satisfied that the alleged statements by the complaining witness would have had the tendency to make the existence of any fact that is of consequence to

the determination of the action more probable than it would be without the evidence. In addition, the Court is also satisfied that any potential error was not prejudicial. Consequently, Defendant's conviction should be affirmed.

Based upon the reasons set forth above, the Court finds no prejudicial error occurred during Defendant's trial, and therefore that Defendant's conviction should be affirmed. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

JMB/kmv

DATED: August 8, 2006

cc: Denise M. Hart, Asst. Prosecuting Attorney

Jarrold J. Flemming, Attorney at Law



JAMES M. BIERNAT, Circuit Judge